



DETERMINATION

Fair Work Act 2009

s 160—Variation of modern award to remove ambiguity or uncertainty or correct error

Variation of modern awards on the Commission’s own motion – modern award superannuation clause review

(AM2022/29)

NURSERY AWARD 2020

[MA000033]

Nursery industry

JUSTICE HATCHER, PRESIDENT
VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT CLANCY

SYDNEY, 26 MARCH 2024

Variation on the Commission’s initiative – review and variation of modern award superannuation clauses to reflect current superannuation requirements – Fair Work Legislation Amendment (Protecting Worker Entitlements) Act 2023 – superannuation in the National Employment Standards.

A. Further to the decision issued by the Full Bench on 26 March 2024 [[\[2024\] FWCFB 189](#)], the above award is varied as follows:

1. By deleting clause 19.1 and inserting the following:

19.1 Superannuation legislation

- (a) The NES and Superannuation legislation, including the *Superannuation Guarantee (Administration) Act 1992* (Cth), the *Superannuation Guarantee Charge Act 1992* (Cth), the *Superannuation Industry (Supervision) Act 1993* (Cth) and the *Superannuation (Resolution of Complaints) Act 1993* (Cth), deal with the superannuation rights and obligations of employers and employees.
- (b) The rights and obligations in clause 19 supplement those in superannuation legislation and the NES.

NOTE: Under superannuation legislation:

- (a) Individual employees generally have the opportunity to choose their own superannuation fund.

- (b) If a new employee does not choose a superannuation fund, the employer must ask the Australian Taxation Office (ATO) whether the employee is an existing member of a stapled superannuation fund and, if stapled fund details are provided by the ATO, make contributions to the stapled fund.
- (c) If an employee does not choose a superannuation fund and does not have a stapled fund, the choice of superannuation fund requirements will be satisfied by contributions made to a superannuation fund nominated in the award covering the employee, provided the fund is able to accept contributions for the benefit of the employee.
- (d) A fund may not be able to accept contributions for the benefit of an employee if the employee would be a new member of the fund's MySuper product and the MySuper product is closed to new members because it has failed the performance tests of Australian Prudential Regulation Authority (APRA) for 2 consecutive years.

2. By deleting the introductory paragraph appearing in clause 19.4 and inserting the following:

Unless, to comply with superannuation legislation, the employer is required to make the superannuation contributions provided for in clause 19.2 to another superannuation fund, the employer must make the superannuation contributions provided for in clause 19.2 and pay any amount authorised under clauses 19.3(a) or 19.3(b) to one of the following superannuation funds or its successor, provided that, in respect of new employees, the fund is able to accept new beneficiaries:

B. This determination comes into operation on 9 April 2024. In accordance with s.165(3) of the *Fair Work Act 2009* this determination does not take effect in relation to a particular employee until the start of the employee's first full pay period that starts on or after 9 April 2024.



PRESIDENT